



For these reasons, the Motion To Strike should be granted because it: contravenes the scheduling order; was filed *679 days* late, without leave of Court (which leave was *de facto* sought in the May 10 teleconference with the court *and rejected*); and the Insurer desires to proceed to summary judgment even though it *still has not* complied with the Court's Order sustaining Mr. Kearney's Motion To Compel.

Rather than awaiting the Court's "scheduling order *to follow*" – in an apparent attempt to take that authority away from the Court and force the Court's hand, defendant, contrary to rule, proceeded to file a delinquent motion without leave.

Rather than addressing the patent violations of procedure, the Insurer focuses its opposition to the Motion To Strike on completely incorrect legal and factual arguments relating to Mr. Kearney's claims:

First, Mr. Kearney has not been overpaid. He has been *underpaid*: the Insurer was required to pay Mr. Kearney \$36,000+ in March 2006 – benefits it had unreasonably and improperly denied Mr. Kearney from 2002 – 2006 on a consistent monthly basis.

Second, defendant completely ignores the factual history of these parties and misstates the law by assuming that the Court's January 2006 Order terminates all claims, including for example the invasion of privacy and emotional distress tort claims. It does not.<sup>5</sup>

A snippet of the evidence of invasion of privacy (which is unrelated to the issue decided by this Court in January 2006) is the Insurer's secret intrusion into Mr. Kearney's private meal with his girlfriend. (*See, Exhibit 1*). As the Court can see from Exhibit 1 – despite the fact that Mr. Kearney's medical disability has *never* been disputed – the Insurer followed Mr. Kearney and his girlfriend to a restaurant. After Mr. Kearney sat intentionally in a private booth that provided screening from others by curtains, the Insurer placed itself in a neighboring booth, moved the curtain screen, and placed an audio and video recording device in a position where it could capture the

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<sup>5</sup> Attorney Ellis stated at the February 10, 2006, conference incorrectly that the IIED and Privacy Counterclaims were barred by the statute of limitations. Apparently the Insurer and its new counsel concede that such argument was baseless -- since that argument is absent from the delinquent Motion For Summary Judgment.

actions of both Mr. Kearney and his girlfriend – who believed they were enjoying a private meal.

The Insurer cannot be permitted to engage in the behavior it has in the 13 years since Mr. Kearney filed his claim. And they cannot now disregard this Court and disregard the Court's rules. The Motion to Strike should be sustained and the trial of this matter set for the earliest possible time.

Respectfully submitted,

s/ Michael A. Roberts  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been filed electronically with the court and thereby served this 1<sup>st</sup> day of May, 2006, upon plaintiff's counsel and counsel for the Third-Party Defendant.

s/ Michael A. Roberts